APPELLATE CRIMINAL.

Before Mr. Justice Mirza and Mr. Justice Broomfield.

EMPEROR *v.* DINKAR NHANU MANGAONKAR.*

1930
January 29.

Criminal Procedure Code (Act V of 1898), section 103—Requisites of a valid search—Presence of Panchas—Presence of accused—Irregularity in conducting search not sufficient ground to set aside conviction.

Accused was found in possession of three bottles of Kaju liquor. One bottle was found in a room inside the house, the other two bottles under an ash heap outside under the roof of his Padvi. The search of the accused's house was not conducted in the actual presence of the Panchas as required by section 103 of Criminal Procedure Code; the accused was, however, present at the search. The accused was convicted under section 43 (1) (*a*) of the Abkari Act, V of 1878. The accused applied in revision to the High Court.

Held, (1) that both the letter and the spirit of section 103 of Criminal Procedure Code require that the Panchas should be present at and should actually accompany persons making the search and should be actual witnesses to the fact of the finding of the incriminating articles and that it is not sufficient compliance with the section that the Panchas should merely be summoned and kept present outside a building during a search within and then shown what has been found;

(2) that failure, however, to comply with the clear provisions of section 103 was not *per se* sufficient to set aside the conviction, especially as the accused was present during the search and it was not shown that there was any failure of justice owing to such non-compliance;

(3) that the Court must carefully scrutinize all evidence in the case and that the fact of possession of the offending article by the accused must be proved beyond reasonable doubt:

Ramesh Chandra Banerjee v. *Emperor*[1]; *Kutroo* v. *Emperor*[2]; *Abdul Hafiz Khan* v. *Emperor*[3]; *Ah Tuck* v. *Emperor*[4] and *Lachmi Narain* v. *Emperor*,[5] followed;

(4) that where on account of failure to comply with the provisions of section 103 of Criminal Procedure Code, the evidence of possession by the accused of the offending articles is unsatisfactory the conviction should be set aside.

THE facts are fully set out in the judgment.

K. K. Gadgil, with *B. G. Modak*, for the applicant.

P. B. Shingne, Government Pleader, for the Crown.

*Criminal Revisional Application No. 408 of 1929, against conviction and sentence passed by S. V. Kelkar, Second Class Magistrate, at Vengurla and confirmed on appeal by W. Gilligan, District Magistrate, Ratnagiri.

(1) (1913) 41 Cal. 350.
(2) (1925) 26 Cr. L. J. 1112.
(3) (1925) 27 Cr. L. J. 265.
(4) (1906) 4 Cr. L. J. 390.
(5) (1919) 20 Cr. L. J. 742.

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BROOMFIELD, J. :—The accused, on whose behalf this revision application has been presented, was convicted by the Second Class Magistrate, Vengurla, for an offence under section 43 (1) (*a*) of the Abkari Act, the conviction being based on evidence to the effect that a bottle containing Kaju liquor was found in a room of his house and two other bottles also containing some liquor were found buried in a heap of ashes, under the roof of his Padvi. The bottle of liquor alleged to have been found in the house contained $1\frac{1}{2}$ drams and the two bottles found in the ash heap outside contained 6 drams and 4 drams respectively. The accused appealed against his conviction but his appeal was dismissed.

The only contention put forward in this revision application, which, in our opinion, has any substance is that the search of the accused's house was not carried out in the manner prescribed by section 103 of the Criminal Procedure Code. It is provided there that before making a search, the officer about to make it shall call upon two or more respectable inhabitants of the locality to attend and witness the search. It is further provided in clause 2 that the search shall be made in their presence. Now in this case, although Sub-Inspector Naik, who took part in the search, has stated at the beginning of his deposition that the house was searched in the presence of Panchas, it appears that the three persons who were summoned as Panchas did not actually witness the search of the house and finding of the bottle of liquor therein. Sub-Inspector Naik says that he was standing outside the house until the bottle of liquor was found, and then he went inside the room. Two of the Panchas, according to him, were with him. The third Pancha, he says, had gone into the house, and he mentions that the Pancha who went inside was probably Mahableshwar. Mahableshwar,

however, was examined as a witness and he has stated that neither he nor the other two Panchas went inside until the bottle of liquor was found. Inspector Mondkar, who actually made the search, has stated that the Police Patil who was also one of the Panchas went inside with him. But the Police Patil was also examined as a witness and has stated that he and the other two Panchas went inside with Mr. Naik after the finding of the bottle of liquor and not before. This witness deposes that four persons went into the house to make the search. They were 3 Excise peons and Inspector Mondkar. They were accompanied by the accused but not by any of the Panchas. It is quite clear, therefore, that there were not 2 of the Panchas present inside the house while the search was being made and when the bottle was found, and it is doubtful on the evidence whether there was even one present inside the house at that time. We consider that both the letter and the spirit of section 103, namely, the provisions that the Panchas are to attend and witness the search, and that the search shall be made in their presence, require that the Panchas should actually accompany the persons making the search and should be actual witnesses to the fact of the finding of the property. It is not, in our opinion, a sufficient compliance with this section that the Panchas should merely be summoned and kept present outside a building while the search is being carried on within it, and then called in to see what has been found.

The question then arises whether this irregularity in the search and the failure to comply with the clear provisions of section 103 make it necessary that the conviction of the accused should be set aside. In connection with this point we have been referred to a number of authorities, but unfortunately the majority of them are not in any authorised report. The learned

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counsel for the applicant relies on *Ah Tuck* v. *Emperor*[1] and *Lachmi Narain* v. *Emperor*.[2] The former case was a prosecution for gambling under the Burma Gambling Act. The irregularity there was that the persons called as Panchas were not respectable persons of the locality within the meaning of section 103. It was pointed out by the Court that the provisions in section 103 were aimed against possible chicanery and unfair dealing on the part of the officers entrusted with search warrants, and were made in order to ensure confidence in neighbours of the persons whose houses were searched and in the public generally that anything incriminating which may be found in premises searched shall be really found and shall not be what is called " planted ". These remarks are apposite, but the actual decision in the case was that as the Burma Gambling Act requires that a search shall have been made strictly in accordance with section 103 in order that a certain presumption under section 7 of that Act could be drawn, and as the provisions of section 103 had not been complied with, therefore the presumption could not legitimately be applied. That is a point somewhat different from the one with which we have to deal.

The case of *Lachmi Narain* v. *Emperor*[2] was a prosecution under the Opium Act and the irregularity was that the officer making the search entered the premises without search witnesses. Mr. Justice Das who tried the case remarked as follows (p. 743) :—

" It is with some object that the Legislature has provided the safeguards and when they are deliberately broken it is, in my opinion, not for the accused to show that they have been prejudiced. The prejudice is, in my opinion, on the face of the record. They should not have entered the premises without search witnesses, the object being that it may not be in their power to smuggle articles into the house and bolster up a false case against them."

The conviction, however, in that case was not set aside on this technical ground, but by reason of the cumulative

(1) (1908) 4 Cr. L. J. 390. (2) (1919) 20 Cr. L. J. 742.

effect of a number of irregularities affecting other matters besides the search.

The Government Pleader, who maintains the view that in spite of the irregularities in the search nevertheless the conviction ought to be sustained, relies mainly on *Ramesh Chandra Banerjee* v. *Emperor*.[1] The search in that case was made in the presence of witnesses, but the accused were not allowed to be present as required by section 103. It was held by Woodroffe J. that the exclusion of the occupants of the place during the search was not a technical but a substantial violation of the law. The effect, however, of such irregularities, according to the learned Judge, is to necessitate a careful scrutiny of the evidence as to the search, but if, notwithstanding the irregularities, the Court holds that no advantage has, or could have been, taken of them, they have no further effect. Therefore, in spite of the irregularities in the search in the course of which certain incriminating articles were found, the Court accepted the evidence produced by the prosecution as proving that as a matter of fact those articles were found. To quote from the judgment (p. 370) :—

"However this be, the fact remains that the accused were not present at the search, and this is an irregularity which they are entitled to ask us to consider. The evidence must undoubtedly be carefully scrutinized on that account. It is to be noted, however, that there were two search witnesses present. But after all if, upon a careful scrutiny of the evidence, we come to a conclusion that notwithstanding the absence of the accused, advantage was not, and could not have been, taken of it, the irregularity, whilst serving to exact from the Court a careful scrutiny of the evidence relating to the search, has no further effect. It is not sufficient to suggest that articles might have been fraudulently introduced : we must see whether there are any reasons to suppose that this was done."

In the particular case the Court held that there were no such reasons.

The Government Pleader also referred to *Kutroo* v. *Emperor*[2] and *Abdul Hafiz Khan* v. *Emperor*.[3] The

[1] (1913) 41 Cal. 350. [2] (1925) 26 Cr. L. J. 1112.
[3] (1925) 27 Cr. L. J. 265.

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first was a case under the Arms Act in which the irregularity was that the search did not take place " in the presence of some officer specially appointed " as required by section 30 of the Indian Arms Act. The decision was that in spite of the search not being lawful, there being sufficient evidence that the accused was in unlawful possession of the arms, the conviction was justified. In *Abdul Hafiz Khan* v. *Emperor*,[1] which was a case under the U.P. Excise Act, it was also held that an irregularity in the search did not render illegal the conviction of a person who was found in possession of an excisable article on such search. The irregularity there was that the officer making the search did not obtain a warrant from the Collector, and that, though he had taken witnesses with him, these witnesses were not " respectable inhabitants of the locality." In the course of his judgment Kanhaiya Lal J. said (p. 266) :—

" It is undoubtedly important that an officer making a search should comply with these provisions, for the credibility of his story may in many cases depend on the support it might receive from the persons accompanying him in the search. But if for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality and a search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article, the accused who is found in possession of that article can all the same be convicted, if the Court is satisfied from the evidence that an offence has been committed."

After considering these authorities we are not prepared to hold that the mere fact that the Panchas were not present throughout the search and did not witness every detail of it would be enough in itself to justify us in setting aside the conviction. It would be open to us to find the fact of possession of the illicit liquor proved, provided that on a consideration of all the evidence in the case we were satisfied that that fact had been proved beyond reasonable doubt. There are difficulties, however, in this case which arise directly from the fact that the provisions of section 103 were not strictly complied with.

[1] (1925) 27 Cr. L. J. 265.

As I have said, the accused himself was present at the search and the evidence shows that before the search began the accused had searched the persons of the three excise peons and also the persons of the Panchas. If, therefore, the circumstances had made it perfectly plain that the bottle of illicit liquor could not have been placed where it was by some one from outside then we might have been able to find the accused's possession of it proved, although the Panchas had not actually witnessed the finding of it. This, however, is just where the difficulty comes in. The accused appears to have alleged from the beginning that this bottle of liquor had been placed in the house by some enemy of his. This is no doubt the sort of defence which is usually put forward in these cases, but the defence has more to support it in this case than it usually has owing to the fact of a paper being found tied to the bottle with certain writing on it, the meaning of which even after the lengthy discussion of it by the Magistrate still remains somewhat mysterious. The trial Magistrate has expressed himself as being satisfied that this bottle, which is alleged to have been found hanging in a basket suspended from the roof, could not have been inserted from outside. It is not very clear on what this opinion is based. One of the Panchas who was examined has stated in his evidence that at the time the bottle was found the accused said that it had been placed there by somebody from outside, and so an empty bottle was given to him and he was asked to place it in the basket but was unable to do so. The witness proceeds to state, however, that if some loose stones in the wall were removed the bottle could have been placed in the basket from outside. On the other hand the Police Patil has stated that at that time, that is at the time of the search, it was not ascertained whether the bottle could or could not have been

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put in from outside. At a subsequent stage it appears that the trial Magistrate himself went to the house in order to test the defence theory. This test, however, was abortive, because the exact position in which the basket had been hanging was disputed and could not be exactly determined. Now it is obvious that if the Panch witnesses had been present at the time when the bottle was found in the basket, as the provisions of section 103 clearly require that they should have been, there could have been no doubt or dispute upon this point. The exact position of the basket with reference to the holes in the wall could have been fixed, and the Court would have been in a position to test the probability of the accused's story.

As we consider that in this case the failure to comply with the provisions of the law relating to searches has left the evidence in an unsatisfactory condition, so that there is a reasonable doubt as to whether the bottle of liquor in the basket really was in the possession of the accused, we are of opinion that the conviction ought not to be sustained. I may state that as regards the bottles of liquor found in the ash heap it is not disputed that those could have been placed there by any body, and apart from the bottle found in the basket the conviction of the accused would admittedly not have been justified. The conviction and sentence are set aside and the accused is acquitted. The fine of Rs. 10, if paid, should be refunded to him.

We see no reason to interfere with the order of the lower Court with regard to the property found.

MIRZA, J. :—I agree.

Rule made absolute.

B. G. R.